

1949

George A. Lowe Co., The Salt Lake Hardware Co.,
and Strevell Paterson Hardware Co. v. Public
Service Commission of Utah, Donald Hacking, W.
R. McIntyre, and Oscar W. Carleson : Brief of
Respondent

Utah Supreme Court

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In the Supreme Court of the State of Utah

GEORGE A. LOWE COMPANY, a
corporation, THE SALT LAKE
HARDWARE COMPANY, a cor-
poration, and STREVELL PATER-
SON HARDWARE COMPANY, a
corporation,

Petitioners,

vs.

Case No. 7283

PUBLIC SERVICE COMMISSION OF
UTAH, DONALD HACKING,
Chairman, W. R. MCINTYRE and
OSCAR W. CARLSON, Commis-
sioners,

Respondents.

RESPONDENT'S BRIEF

FILED

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APR 20 1949

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CLERK, SUPREME COURT, UTAH

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STATEMENT OF FACT

The petitioners herein during the month of October, 1948 entered into an agreement the full text of which is set forth in the petitioners' brief, whereby the petitioners jointly rented a motor truck and hired a driver to transport mer-

chandise belonging to the petitioners to their customers throughout the State of Utah. The petitioners seek this writ on the grounds that if not restrained the Public Service Commission of Utah will interfere with the operation of this business arrangement. Respondents have taken no exception to the form of the action or the sufficiency of the pleadings as it is the desire of the respondents to secure a judicial determination of the question here involved in the most expeditious manner.

It is the contention of the respondents that the operation as carried on by the petitioners is contrary to the laws of the State of Utah regulating contract motor carriers of property for the reasons which will be hereafter more fully discussed. The respondents will attempt to meet the arguments raised by the petitioners in their brief and then will set forth affirmative arguments in favor of their position herein.

ARGUMENT

THE AGREEMENT HERE IN QUESTION IS IN FACT AND EFFECT A PARTNERSHIP AGREEMENT.

It is the position of the respondents herein that the agreement entered into by the petitioners is an agreement by the petitioners to carry on a business of transporting goods and merchandise over the highways of the State of Utah and that by virtue of said agreement a new partnership entity comes into being, which partnership entity is a contract motor carrier of property as defined in Sec. 76-5-13 U.C.A., 1943.

As is stated by petitioners, Sec. 69-1-3, U.C.A., 1943 provides:

"A partnership is an association of two or more persons to carry on as co-owners a business for profit."

Sec. 69-1-1 U.C.A., 1943 defines the word person as used in the chapter on partnership as follows:

" 'Person' includes individuals, partnerships, corporations and other associations."

The fact that the three petitioners are corporations in themselves would have no effect upon whether or not their association in a business foreign and apart from the business which they operate in their corporate capacity constitutes a partnership.

Petitioners make several categorical statements regarding the nature of their operation none of which appear to the respondents to be supported by the facts of the case. They state first that the activity carried on pursuant to the agreement set forth in the petitioners brief is not a business. With this statement the respondents cannot agree. The term "business" is rather a loosely used term to describe any commercial activity. Webster defines the term as:

"That which busies, or engages time, attention or labor as a principal serious concern or interest."

The following definitions are found in the cases indicated:

" 'Business' in its broad sense is the effort of men by varied methods of dealing with each other to improve their individual economic conditions and satisfy their desires." *People ex rel Attorney General v. Jersin*, (Colo.) 74 Pac. 2nd 668.

" 'Business' is a very comprehensive term and embraces everything about which a person can be employed." *In re Booth*, 18 Fed. Supp. 79.

Certainly the activity carried on by the petitioners under their contract appears to be a business within the contemplation of the partnership act.

The petitioners state further that they are not the co-owners of anything. With this statement also the respondents take issue. It is not necessary that the partners own in common any tangible property, or for that matter any intangible property other than the partnership business itself. For instance, it is entirely conceivable that a legal partnership might exist without the partners owning a book, a piece of office furniture or even the lease on an office provided that they were co-owners of the legal business. This approach was taken by the court in the case of *Bentley v. Brossard*, 33 Utah 396, 94 P 736, where the court stated:

"Furthermore each party here had, not only an interest in carrying on the business or adventure, but also a common ownership in the business itself."

However if the petitioners desire something other than mere co-ownership of the business as a basis for establishment of a partnership it is called to the attention of the court that in the case now being argued, the petitioners are co-owners of leases on motor vehicles. No reason appears why the owner of a lease-hold interest would not be within the term ownership just as much as would be the owner of the residual interest.

Further the petitioners state that this is not a business carried on for profit. Here also the respondents are forced to take issue. It must be assumed that as a result of this

working arrangement the petitioners are able to secure transportation for their merchandise at a lower price than they would have to pay other contract carriers. At least it should be assumed that that was the hope and desire with which they entered into the partnership arrangement. If such is the case and the petitioners were each to pay to the partnership entity the regularly established price of other contract carriers, a profit would result which would be available for distribution. Rather than pay this higher amount and then distribute the amount over and above costs back to the partners in the form of profit, the petitioners choose to make the payment to the partnership entity in an amount just sufficient to cover actual operating expenses. By doing this they receive a financial advantage just as real and in the same amount as if there were a distribution of the residue of income over and above expenses. Once again referring to Webster, "profit" is defined as:

"Acquisition of good, useful consequence, benefit, avail, gain."

The following definition of "profit" is found in *Mundy v. Van Hoose* (Ga.) 30 SE 783:

"Profit is the acquisition beyond expenditure; excess of value received for producing, keeping or selling over cost, hence pecuniary gain in any transaction or occupation."

The fact that the petitioners may not have intended to enter into a partnership arrangement is not controlling if in fact the association formed is such as is in contemplation

of the law is a partnership. As was stated by this court in the case of Bentley v. Brossard, 33 U 396, 94 P 736 at page 742:

"When the trial court permitted the jury to determine from all the evidence and circumstances whether the defendants had intended to assume the relation of partnership towards each other, it also committed error. True it is sometimes said that to constitute a partnership the parties must have intended to create such relation. 'But,' as was said by the court in the case of Fleming v. Lay, 109 Fed. 952, 48 C.C.A. 748, 'by this it is meant to say they must have intended to make such stipulations as in law constitute a partnership, and not that they intended the conclusion without regard to the conditions upon which it results as matter of law.' And, as said by Mr. Lindley in his work on partnership, 'if they have in fact stipulated for all the rights of partners, an agreement that they shall not be partners is a useless protest against the consequences of their real agreement.' 1 Lindl. Partn. (5th Ed.) 11)"

See also in this connection Bridgman v. Winsness, 34 U 383, 98 Pac. 186.

Let us ask ourselves, if this is not a partnership, what sort of an association is it? It is certainly more than a joint venture. A joint venture has many of the aspects of a partnership except that it is confined to one or a limited number of transactions. Here the association is conducting for a period of time a course of business. They are not limiting their business to one certain haul or to any limited number of hauls, but rather it is the intention to do as much hauling during the life of the contract as the persons with whom the

association does business may desire. Furthermore, let us ask ourselves who would be responsible should damage result from the negligence of the driver of the truck during its operation. Certainly there is someone or some association for whom the driver is agent. It does not appear logical to maintain that he is agent merely for the company whose goods happen to be on the truck at the time such negligence occurs. While it is true that the expense of the operation of the truck including the salary of the driver is distributed between the three petitioners every two weeks according to the time spent on the hauling for each individual member of the association, it does not appear that the driver would become the employee of the Salt Lake Hardware Co. when he was driving for Salt Lake Hardware Co., of Strevell Paterson Hardware Company when driving for Strevell Paterson and George A. Lowe Company when driving for George A. Lowe Company.

The three companies do not make their payments in salary directly to the driver as is shown by the petition. They are billed every two weeks for their share of the expenses and although there is a breakdown given in the billing, a total figure is reached and checks are to be made payable to H. H. Ellsworth, supervisor of their operations. Evidently Ellsworth in turn pays the driver his salary. It is evident, therefore, that there is some entity existing between the petitioners herein and the persons who maintain and operate the trucking service. What can this entity be if not a partnership? The answer appears obvious that it is and must be a partnership whether the parties intend it to be or not, and whether or not there is a common partnership name.

Although there appears to be no case in point directly deciding the matter, the statutes of the State of Utah appear to regard a partnership as an entity separate and apart from the individual members thereof. Sec. 104-3-26, Utah Code Annotated 1943, provides that a partnership may be sued under a common name and that service of summons may be had upon one of the partners for the entire partnership. Such procedure is obviously inconsistent with the conception that no partnership entity exists.

THE PETITIONERS COME WITHIN THE DEFINITION OF THE STATUTES OF THE STATE OF UTAH CONCERNING CONTRACT MOTOR CARRIERS.

Sec. 76-5-13 U.C.A., 1943 defines a contract motor carrier of property as follows:

“ ‘ Contract Motor Carrier of Property’ means any person engaged in the transportation by motor vehicle of property for hire and not included in the term common motor carrier of property as hereinbefore defined.”

If the court agrees with the argument set forth in the proceeding section by respondents that the association of the petitioners herein constitutes a separate entity, the only question to be determined in deciding whether or not the operations of the petitioners partnership association comes within the definition set forth above is whether or not the operation is carried on for hire. Certainly there can be little question that compensation is paid to the partnership entity by the individual members thereof for the services rendered.

Attached to the petition are copies of the statements submitted to each of the individual members each two weeks by the supervisor of transportation. Certainly this is compensation, and if in fact it is paid by the petitioners not to themselves but to a separate entity it cannot be questioned that the operation is one for hire.

In the Florida case of Merchants Mutual Association Inc. v. Mathews et al, 149 Southern 27, a number of companies had formed a corporation for the purpose of carrying on a transportation business to serve the stockholders under the same sort of arrangement which is now before the court. In deciding the question of whether or not the service came within the definition of carrying for hire, the Florida court stated:

“The appellant is a corporation organized for the express purpose of conducting the business of hauling by use of its motor trucks on the public highways of Florida for compensation the goods, wares and merchandise of its stockholders only. Under its charter it must haul for its stockholders at cost and without profit. The pleadings admit that the corporation does so contract with and so serve its stockholders. The terms of the contract are mere incidents to the transaction of the business. By limiting its patronage to its stockholders the corporation successfully eliminated itself from the classification of common carrier, but by the very terms of its charter and by its admitted contracts with its stockholders it brings itself within the purview of the statutes regulating private contract carriers.”

In a subsequent case, State v. Karel, 180 So. 3, the

Florida Supreme Court decided by divided court that the same ruling would not apply to an unincorporated association because of the fact that under the laws of the state of Florida a partnership was not regarded as having a legal entity; however, it did not retreat from its position in the earlier case.

In as much as the Statutes of the State of Utah do appear to regard a partnership as an entity separate and apart from the members thereof, the reasoning of the Florida court in the Merchants Mutual Association Inc. case is compelling in this case. In the Montana case of the Christie Transfer and Storage Company v. Match, 28 Pac. (2d) 470, the Montana Supreme Court held that an unincorporated association hauling for its members was not within the statutes, but here again the court reached its position on the ground that there was no such thing as a partnership entity and that the members of the association were merely hauling for themselves. However, if the position is taken as our statutes seem to require that the partnership entity be regarded as a thing separate and apart from the individual members thereof, the logic of the Montana case has no application whatsoever.

THE PROPOSED ACTION OF THE COMMISSION DOES NOT VIOLATE THE CONSTITUTIONS OF THE UNITED STATES OR OF THE STATE OF UTAH.

The question of whether or not the attempt of the Public Service Commission to regulate the operations of the petitioners meets with a constitutional objection of course depends upon whether or not we are in fact concerned with a matter of hauling for hire. At one time the courts leaned

to the view that public regulatory bodies could regulate the activities only of common carriers. However, it soon became evident that in order to protect common carriers it was necessary that some regulations be exercised over those engaged in business as contract carriers for hire.

In the case of *Hicklin v. Coney*, 290 U. S. 169, the Supreme Court of the United States upheld the power of statutes regulating the operations of private contract carriers. The term private contract carrier has been defined in a number of cases, see *Ace High Dress Co. v. J. C. Trucking Co.* (Conn.) 191 Atlantic 536; *Koppers Conn. Coke Co. v. James McWilliams Blue Line* 18 Fed. Supp 992; *First National Stores v. H. P. Welch Co.* (Mass.) 55 N. E. 2nd 200. Here again the question of whether or not the petitioners' association falls within the accepted definitions of contract motor carriers depends upon whether or not a partnership entity is recognized as separate and apart from the individual members thereof. If it is so recognized, then clearly we have a contract motor carrier for hire, the regulation of which is prescribed by the statutes and permitted by the constitution. If there is no contract carriage for hire, then the statutes do not prescribe the regulation and so we are involved with no constitutional question.

THE LEASE OF THE VEHICLE TO PETITIONERS CONSTITUTES THE OWNER OF SUCH VEHICLE A CONTRACT MOTOR CARRIER FOR HIRE.

A matter which has not been considered by petitioners in their brief or in their petition but which is very material

in this case is the status of the owner of the motor vehicles which are leased by the petitioners. This so called lease arrangement is a device which has been attempted in this state by a number of operators in an attempt to contravene the Statutes of the State regarding contract motor carriers. It is the position of the Commission than an individual that leases a motor vehicle for compensation to another individual to be used by that individual for hauling property upon the highways of the State of Utah is a contract motor carrier for hire and comes under the regulations of the statute. To hold other wise would be to permit subterfuge which would invalidate the contract motor carrier regulations.

In the case of *Cove v. The District of Columbia*, 90 Fed. 2nd 383, the court held that a person engaged in the business of renting funeral cars for persons desiring to use the same was a contract motor carrier for hire even though full control of the operation of the vehicle was under the person hiring the same.

In the case of *State ex Rel Anderson v. Williston* (Missouri) 102 So. W 2nd 199, a similar ruling was made in regard to one who chartered buses. The fact that in the case now before the court the lessee paid the gas and oil and other operating expenses of the truck in addition to the lease charge offers no distinction. The owner of the motor vehicle is making available upon the payment of compensation a truck to be used for transporting goods over and across the highways of the State of Utah, and as such is a contract motor carrier for hire. In order to prevent a violation of the law

by this subterfuge the commissioner would take action against both the lessor and lessee of the vehicle.

The court should look to the actual result obtained rather than to the form in determining whether or not the lessor of this equipment is actually operating as a contract motor carrier for hire. In the case of *Denver & Rio Grande Western R. R. Co. v. Linck*, 56 Fed. 2nd 957, the court stated:

“A person cannot by the execution of a contract change the character of his operation from those of a common carrier to those of a private carrier.”

Likewise by the execution of a lease a person should not be permitted to change the character of his operation from that of a contract motor carrier to that of a lessee.

In the case of *Tilton v. Model Taxi Corp.*, 23 Fed. Supp. 585, the court stated:

“The fact that the owners rented the vehicle is inconsequential, the important thing is how they conduct the business, not that they name it.”

CONCLUSION

Although the number of individuals involved in the case now before the court is small, this method of operation if given judicial approval would result in a complete breakdown of the regulation of contract motor carriers by the Public Service Commission. There are many unincorporated associations in the State of Utah having hundreds or even thousands of members. If these associations were permitted to make motor transport service available to their members without

regulation by the commission it is obvious that the regulation of contract motor carriers would be at an end. Common motor carriers of property would be subject to competition which would be ruinous and prevent them from rendering their necessary public service. The court should not permit this type of violation to get its head into the tent. The petition for a Writ of Probation should be denied.

Respectfully submitted,

CALVIN L. RAMPTON,

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